No. 14-15

Supreme Court, U.S.
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RECORD
AND
BRIEFS

IN THE

Supreme Court of the United States

RICHARD ARMSTRONG, *et al.*,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

None of the corporations who were Plaintiffs-Appellees below, and who are Respondents herein, has a parent corporation, and no public corporation owns any stock in these corporations.

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STATEMENT OF THE CASE

Medicaid is a joint state-federal program to provide needed medical care to the poorest of America's citizens. *Douglas v. Indep. Liv. Ctr.*, 132 S.Ct. 1204, 1205 (2012). As set out in the petition, Medicaid encompasses a variety of services offered via state plans and "waivers" specifically permitted by statute. 42 U.S.C. §1396n. Waiver applications set out the detailed methods by which a state will provide services such as home and community based services and residential habilitation for developmentally disabled Medicaid participants. 42 U.S.C. §1396n(c). Residential habilitation, the service at issue in this case, prevents the institutionalization of developmentally disabled adults by providing skills training, assistance with decision-making, socialization, mobility, and various other activities of daily living which the Medicaid participants would otherwise be unable to perform, and doing so in the community rather than a hospital. Pet. App. 8.

The Idaho Department of Health and Welfare last voluntarily adjusted its reimbursement rates for residential habilitation services in supported living environments in 2006. Pet. App. 17. During the period leading up to 2009, the State had undertaken, pursuant to state law, a lengthy process to change the way in which it would calculate such reimbursement rates. App. 18; Idaho Code §56 118. That process resulted in proposed waiver amendments being submitted to CMS to incorporate the new reimbursement rate methodology. Pet. App. 18-19.[1]

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1. The District Court's Decision is not entirely clear on this point, but was based upon the Stipulated Facts submitted by the parties, which specified that the State had sought CMS

Title XIX of the Social Security Act creates the Medicaid program and requires, among other things, that in order for a State Medicaid Plan to receive federal funding it must provide rates that are "consistent with efficiency, economy, and quality of care" and sufficient to ensure access to that care. 42 U.S.C. §1396a(a)(30)(A) (hereafter "Section (a)(30)(A)"). While it is generally true that the State of Idaho's DD waiver does not include specific rates for services (See Pet. 7), there is no other evidence of whether Director Armstrong did or did not seek approval of the actual rates at issue in this case, either the pre-existing rates from the 2006 rate adjustment, or the rates ordered implemented by the District Court in April, 2012. Pet. App. 5-6. It was conceded by the Director, however, that for "purely budgetary reasons," he did not implement the rates generated by the new rate setting methodology, which was submitted to CMS. Pet. App. 4.

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approval for waiver amendments incorporating the new rate-setting methodology. The parties stipulated to the facts in the case based on counsels' understanding of what facts would be relevant to a final determination of the issues in the case, which was in turn based on the law as it existed at the time of the stipulation. The stipulation was entered prior to this Court's decision and opinions in *Douglas*, and thus did not address what action CMS took on the proposed amendment. Director Armstrong, however, publishes the current, approved wavier, on the website of the Idaho Department of Health and Welfare. The current approved waiver includes the language establishing the rate setting methodology for residential habilitation services based on cost studies and surveys. *Application for a 1915(c) Home and Community Based Services Waiver*, http://healthandwelfare.idaho.gov/Portals/0/Medical/DD%20Waiver.pdf (last visited August 21, 2014), p. 163.

Neither providers, such as the Plaintiffs here, nor participants have any method available to them to seek a determination by CMS of whether a plan complies with the statutes or regulations. CMS provides a detailed procedure by which the agency can initiate and pursue a compliance proceeding, 42 CFR §§430.60-430.104. Those procedures apply, however, only if CMS has itself decided that there is an issue of noncompliance. 42 CFR §§430.35, 430.60.

In the absence of any method to seek CMS review of alleged noncompliance, and in the face of Director Armstrong's failure to actually implement the rate-setting methodology set out in the waiver amendment, Plaintiffs here brought an action in the District Court. That action alleged that the failure of Director Armstrong to undertake cost studies which would justify existing rates, as well as failing to base rates on any but budgetary considerations rendered the rates inconsistent with federal law and thus preempted.

The case below, as argued and decided by the District Court, focused on the Defendants' failure to update the 2006 rate, despite the development and submission to CMS of a new rate setting methodology following extensive studies of the costs of providing services, and a determination that the new methodology should result in substantial rate increases. Pet. App. 21-22. The District Court held that even inaction by the state, if it resulted in "actual provider costs exceed[ing] the [established] rates" violated Medicaid, particularly where, as here, budgetary concerns formed "the sole basis for reimbursement rates." Pet. App. 22.

In the Circuit Court, the nature of the underlying state conduct was recast as an issue of whether the

State's conduct, what it argued was its inaction, actually "constitutes a 'Thing' in state law that can be preempted under the Supremacy Clause." Pet. App. 4, n. 2. The Circuit Court panel expressed "serious doubt" about whether it was, but concluded that the issue had been waived because it was not raised by the Defendants in the District Court. *Id.*

Relying solely on existing law in a brief, *per curiam*, memorandum opinion, the Circuit Court determined that a cause of action existed under the Supremacy Clause to challenge allegedly preempted state law, and that Section (a)(30)(A) required that where reimbursement rates did not fully cover the costs of service, there must be some basis for that failure other than a purely budgetary one. Pet. App. 4. The Circuit Court affirmed the judgment, and Petitioners have not sought rehearing or rehearing *en banc* despite the Circuit Court panel's statement that only an *en banc* panel could overturn existing law as the petitioners requested. Pet. App. 3, n. 1.

Petitioners did not at any time seek a stay of execution pending appeal. As a result, the rates calculated in reliance on the CMS-approved methodology have been in place since the District Court's judgment of April 12, 2012. Pet. App. 5-6.

REASONS THE PETITION SHOULD BE DENIED

I. THE PETITION SHOULD BE DENIED AS TO BOTH QUESTIONS PRESENTED BECAUSE THE STIPULATED FACTS ARE TOO LIMITED TO ALLOW REASONED CONSIDERATION OF THE SIGNIFICANT CHANGES IN THE LAW PETITIONERS PROPOSE.

While the adage that "hard cases make bad law" is well-worn, it is more likely true that poorly developed facts make for bad law. The parties here entered into stipulated facts on which cross-motions for summary judgment were based, in lieu of completing a trial to develop the facts. Pet. App. 8. That stipulation necessarily pre-dated the District Court's Memorandum Decision and Order which was issued December 12, 2011. Pet. App. 24. That stipulation, now over three years old, failed to address facts which this Court and the Circuit Court has only recently determined should be considered if there is to be a significant change in either the law under the Supremacy Clause or the construction lower courts are to give to Section (a)(30)(A).

The parties did not enter into any detailed stipulations, or present any other evidence addressing the manner in which Idaho's reimbursement rates are actually implemented. Although the parties stipulated that reimbursement rates had been changed in 2006 and had not changed since then, their stipulation did not address how the Defendants went about actually implementing and applying reimbursement rates. The lack of factual development became a problem in consideration of the preemption question when the Circuit Court panel began to question whether the implementation of a reimbursement

rate constituted a "Thing in the Constitution or Laws" of the state within the meaning of the Supremacy Clause. U.S. Const. Art. VI, Cl. 3. While that issue was deemed waived by the Circuit Court, the issue of just how reimbursement rates are implemented would remain an unaddressed but relevant fact in this case, if this Court were to inquire into the existence of a Supremacy Clause based cause of action.

The majority in *Douglas* faced the reality that because CMS had spoken in the intervening period from when the suits were filed to the time of that decision, "the relevant circumstances [had] changed." *Douglas v. Indep. Liv. Ctr.*, 132 S.Ct. 1204, 1207. Although CMS' decision did "not change the underlying substantive question, namely whether California's statutes are consistent with a specific statutory provision," it did have at least the potential to "change the answer." *Id.*, at 1210. Without determining precisely what effect CMS's decision had, the majority held that its "decision carries weight." *Id.* at 1210. What weight it carried was a question to be decided, in the first instance by the lower courts, a question which has not yet been fully answered there, and which was not answered at all in the instant case.

The dissent in *Douglas* recognized implicitly that CMS's position mattered, though it would not have granted it dispositive effect on the question whether a Supremacy Clause based cause of action exists. Nonetheless, in discussing the nature of Spending Clause legislation and its relationship to state action, the dissent recognized that "under the Spending clause [States] agree only to conditions clearly specified by Congress," and the lower courts have "equitable powers to enforce the supremacy of federal law when such action gives effect to the federal rule,

rather than contravening it." *Douglas*, at 1213 (Roberts, C.J., dissenting). The dissent did not specifically address whether a Spending Clause based statute could give rise to a Supremacy Clause based cause of action if, in fact, that cause of action "gives effect" to federal authority as expressed by an agency responsible for its implementation, for the simple reason that such a set of facts was not before the Court at that time.

In the Social Security Act, Congress clearly specified that state plans and waivers must be approved by CMS, 42 U.S.C. §§1396b(a), 1396n(b). Whether the States have agreed to details that go beyond the express statutory requirements, and whether the lower courts can use their equitable powers to enforce a particular construction of the statute might be informed, post-*Douglas*, by whether CMS has clearly spoken on the issue and, thus, whether the state has agreed to such construction. But that part of the analysis is impossible on the record in this case.

The parties stipulated that after developing a new method of setting reimbursement rates for services provided under the DD waiver, the State of Idaho sought CMS approval of that methodology. Pet. App. 18-19.[2] The parties did not stipulate, however, whether or how such approval was granted. *Douglas* was issued in 2012, well after the stipulation of facts was entered in this case. Neither party supplemented the record, and thus the status of Idaho's waiver amendment, and how or on what terms it

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2. The stipulation was entered at a time when the law of the Ninth Circuit was clear and unchallenged on these issues. If the same case were in the District Court today, there can be little doubt that the factual record would be considerably more extensive, and would address these issues.

was approved, is not a matter of evidentiary record in this case. Furthermore, the effect, if any, of CMS's ultimate approval of that methodology was never addressed by the District Court, because at the time, that fact was not deemed relevant. If *certiorari* were granted here, this case would likely suffer the same fate as the cases that were consolidated and decided by *Douglas*, resulting in a remand which would do nothing to advance or resolve the state of the law on these issues.

As to the second question presented, the undeveloped factual record prevents the parties and this Court from determining whether CMS approval of the rate-setting methodology at issue herein would affect the preemption analysis under 42 U.S.C. §1396a(a)(30)(A). Subsequent development of the law in the Ninth Circuit indicates that it could.

After the remand in *Douglas* a separate panel of the Ninth Circuit decided *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235 (9th Cir. 2013). In *Managed Pharmacy Care* the Court found it owed deference to a CMS decision to approve a State Plan Amendment ("SPA").716 F.3d at 1248.[3] The factual record, though adequate at the time the

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3. In the present case, there was no SPA, since the services in question are available and reimbursed under Medicaid solely as the result of a waiver under 42 U.S.C. §1396n(b). Idaho thus did not submit a SPA concerning the rate setting methodology, rather it submitted a request for a waiver amendment. Although *Managed Pharmacy Care* establishes that deference is owed to a SPA, it does not address waiver amendments. The deference owed to either is likely the same, but the matter has not been given serious scrutiny, and a proper factual record might be necessary in order to do so. *See, Skidmore v. Swift & Co., Inc.*, 323 U.S. 214

District Court's decision was made, would leave the Court guessing as to the role agency deference should play in this case. Even assuming that a waiver amendment receives the same deference as a SPA, there is no record in this case to show what exactly CMS approved or how it approved it. Respondents suggested below that CMS's approval of the rate setting methodology required the courts to enforce that methodology, but neither the District Court nor the Court of Appeals addressed the issue, deciding the case on much narrower grounds that were all the record supported. Since those same narrow grounds are all the factual record permits, the petition for *certiorari* should be denied.

Because of this unique factual record, the instant case is a poor choice of vehicles to develop rules of law. A decision in this case would simply leave future potential litigants wondering whether CMS approval was a necessary prerequisite to a Supremacy Clause based case, whether it was a death knell for such a case, or if it mattered at all.

(1944) (degree of deference owed depends on thoroughness, validity and consistency of reasoning behind the agency's decision).

II. CERTIORARI SHOULD BE DENIED ON THE FIRST QUESTION BECAUSE THE ALLEGED SPLIT AMONG THE CIRCUITS IS WHOLLY ONE-SIDED, MAY SIMPLY RESOLVE ITSELF AND, IF IT DOES NOT, WOULD BENEFIT FROM FURTHER DEVELOPMENT IN THE LOWER COURTS.

The Petitioners assert that review is needed to resolve a circuit split. Pet. 14. The split is an extremely recent development, and one in which a single circuit disagrees with nearly every other circuit, and does so almost solely on the basis of a prior dissenting opinion of this Court. While a more genuine split among the circuits may arise, the split on which Petitioners and *amici* rely herein would actually benefit from further development before this Court weighs in.

A. For Many Years the Courts of Appeal Reached The Same Conclusion as That Reached by the Court Below, Resulting in a Nearly Unanimous Consensus that the District Courts Had Jurisdiction and Power to Decide Claims of Federal Preemption of State Law.

Prior to a decision by the Tenth Circuit earlier this year, nearly every Circuit Court of Appeals concurred in the Ninth Circuit's holding that a federal court may resolve the merits of a claim for injunctive and declaratory relief that a state law is preempted.

This relative unanimity was the product of this Court's preemption decisions, such as *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635

(2002). *Verizon* clearly established that a statutory cause of action is not needed for a preemption claim, and was merely the result of a long line of preemption cases that implicitly so held. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Gade v. Nat'l Solid Waste Mgmt. Assoc*, 505 U.S. 88 (1992); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n.*, 461 U.S. 190 (1983); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

From these cases, nearly every circuit reached the same conclusion. *Planned Parenthood of Houston v. Sanchez*, 403 F.3d 324 (5th Cir. 2005); *PhRMA v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *Local Union No. 12004 v. Massachusetts*, 377 F.3d 64 (1st Cir. 2004); *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1278 (11th Cir. 2003); *Ill. Assn. of Mortgage Brokers v. Office of Banks & Real Estate*, 308 F.3d 762 (7th Cir. 2002): *St. Thomas-St. John Hotel& Tourism Ass'n. v. Virgin Islands*, 28 F.3d 232 (3rd Cir. 2000); *Village of Westfield v. Welch's*, 170 F.3d 116 (2ndCir. 1999); *First Nat'l Bank of E. Ark. v. Taylor*, 907 F.2d 775 (8th Cir. 1990).

Indeed, even the Tenth Circuit has held that a "party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1266 (10th Cir. 2004).

B. Only the Tenth Circuit Court of Appeals Has Diverged From This Consensus, and Has Done so Only in Limited Circumstances.

In *Douglas*, the Chief Justice's dissent, joined by three others Justices, questioned whether Spending Clause legislation, in particular, should support an independent right of action where Congress itself had not chosen to create such a right. To date, only the Tenth Circuit has taken up the implied invitation to reconsider Supremacy Clause jurisprudence on this basis.

In *Planned Parenthood of Kan. and Mid-Missouri v. Moser*, 747 F.3d 814 (10thCir. 2014), the plaintiff challenged a Kansas law which restricted the distribution of federally funded grants under Title X of the Public Health Service Act. The Kansas law would have limited such grants to "public entities, hospitals, and federally qualified health centers that provide comprehensive primary and preventative healthcare services." *Moser*, 747 F.3d at 816. The Tenth Circuit described the relevant provisions of the Public Health Service Act as "relatively sparse, consisting of just a few short provisions." *Id.*, at 818. The preemption claim thus relied extensively on regulations adopted by the federal Department of Health and Human Services. *Id.*

Although a lower court had found that the Kansas law was inconsistent with Title X and thus preempted, the Tenth Circuit held that even if that were true, the plaintiff lacked a cause of action from which the courts could fashion a remedy. *Id.*, at 823-824. Because such a holding potentially ran afoul of established circuit precedent including *Chamber of Commerce v. Edmondson*, 594 F.3d 742 (10th Cir. 2010) and *Qwest Corp. v. City of Santa Fe*,

New Mexico, 380 F.3d 1258, the panel deciding *Moser* adopted a complicated and narrow rule:

> We hold only that when actual or threatened state action is allegedly contrary to a federal statute, the Supremacy Clause does not necessarily (it is a matter of statutory interpretation that depends on the specifics of the federal statute) authorize an injunction against the state action when four conditions are all satisfied: (1) the statute does not specifically authorize injunctive relief, (2) the statute does not create an individual right (which may be enforceable under 42 U.S.C. §1983), (3) the statute is enacted under the Constitution's Spending Clause, and (4) the state action is not an enforcement action in adversary legal proceedings to impose sanctions on conduct prohibited by law.

747 F.3d 814, 817.

Thus, the Petitioners and *amici* assert, there is a conflict between several decades' worth of preemption decisions in at least eleven circuits and this Court, and a five month old decision holding that in extremely limited circumstances, defined by at least four individual criteria (and arguably a fifth turning upon statutory construction), one circuit will limit the power of the district courts to pass upon the preemptive effect of Spending Clause statutes. While such can technically be described as a "split" among the circuits, it is not the type that will result in considerable differences in applicable law between different regions of the nation. It is difficult to imagine that such a "split" would challenge either the courts or the legislative branch in

either accomplishing or decreasing any particular degree of uniformity across state lines.

C. There Has Been Insufficient Time For the Law on this Issue to Develop.

Since this Court's opinion in *Douglas*, issued in 2012, *Moser* is the only case to take up the *Douglas* dissent's invitation to reconsider or abandon the long line of cases permitting Supremacy Clause based challenges to state laws. *Moser's* complex and detailed exception to general Supremacy Clause jurisprudence would benefit from additional applications in the lower courts to determine whether it is viable and can be fairly and consistently applied. The other decisions cited by Petitioner Armstrong and the *amici* do not demonstrate a split among the circuits, but instead demonstrate the kind of robust consideration that lower courts should be encouraged to engage in as prelude to an ultimate decision by this Court.

Moser, discussed above, stands alone for the proposition for which it stands. No other circuit has followed it. The Seventh Circuit has expressly chosen not to do so. Over time, the Tenth Circuit's approach in *Moser* may win converts, it may be modified and refined as its rule is deemed too narrow or not sufficiently narrow, or fatal flaws in its reasoning may justify its abandonment. But to date, the issue has simply not seen sufficient development in the lower courts to call for this Court's final decision.

In *Planned Parenthood of Indiana v. Ind. Dept. of Health*, 699 F.3d 962 (7th Cir. 2012), a panel of the Seventh Circuit expressly declined to decide whether a cause of action existed because the question was not jurisdictional. 699 F.3d 962, 983 ("Because our jurisdiction is not at issue,

we can assume without deciding the right-of-action question and proceed directly to the merits.") That the question is not jurisdictional is itself telling. Jurisdiction by definition is "the power of a court to decide" a question put before it. *United States v. United Mine Workers*, 330 U.S. 258, 308 (1947)(Frankfurter, J., concurring); *Steel Co. v. Citizens for a Better Environ.*, 523 U.S. 83, 94 (1998) *quoting Ex Parte McCardle*, 74 U.S. 506, 514 (1869). The Seventh Circuit has definitively not joined the Tenth Circuit in rejecting the power of the district courts to enjoin and declare preemption of state laws.

Neither Petitioners nor *amici* have identified any other federal courts to address the issue, demonstrating that insufficient time has been spent developing appropriate doctrine and considering the implications of such a major shift in constitutional jurisprudence.

D. There is No Basis for Applying the Heightened Burdens of Implied Rights Of Action or the Standards of 42 U.S.C. §1983 to Claims that This Court Has Always Permitted.

Petitioner suggests preemption claims should only be heard in the federal courts if they meet the standards for a cause of action under an implied private right of action or under 42 U.S.C. § 1983. Pet. 17. This Court has never utilized either standard for a preemption claim, and indeed, petitioner cites no case which has so ruled, and this Court should decline the opportunity to consider such an approach.

Petitioner argues that the "authorization" to seek a remedy "must come from Congress." Pet. 17. While this is clearly the conclusion Petitioners would seek in this case, the petition merely begs the question, since this

Court has previously recognized causes of action that Congress clearly did not even consider. *Ex parte Young*, 209 U.S. 123 (1908) of course, is the best known of such cases, but would not satisfy the standards urged by Petitioners. The Court has likewise recognized implied rights of action arising wholly independently of federal statute. *E.g., Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)(implied right of action arises directly from Fourth Amendment to United States Constitution). While this case would present the question of whether *Ex parte Young* would or should provide a cause of action here, and Respondents do not assert an implied right of action based on the same considerations that drove *Bivens*, the suggestion by Petitioner that all causes of action must arise from Congressional action is simply incorrect.

In this case, a remedy is supplied by the Supremacy Clause; not by an implied private right of action, nor by express declaration of Congress. As this Court has explained, "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000). Thus, the cases cited by petitioner requiring express statements by Congress to create an implied private right of action are simply inapposite to Respondents' preemption claim.

This Court rejected the assertion that a district court could not reach the merits of a preemption claim unless the plaintiff could identify a statutory cause of action in *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 642 (2002). Indeed, where a case raised what were clearly questions of federal law, this Court ruled that

the federal courts had "authority under 28 US.C. §1331 to review the [State] Commission's order for compliance with federal law." *Id.* Contrary to Petitioners' assertion that the Ninth Circuit has confused this Court's jurisdiction analysis with its right of action analysis, this Court has specified that not only do the district courts have the power to hear such cases, they have "jurisdiction under 28 U.S.C. §1331 to resolve" them. *Id., quoting Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n. 14 (1983)(emphasis added).

The implication of the Petitioners that the district courts have federal question jurisdiction to hear such cases, but lack a Congressionally created cause of action which is required for them to issue a final remedy, is thus directly contrary to both *Shaw* and *Verizon*.

42 U.S.C. §1983 is an express cause of action to enforce statutory and constitutional rights that provides various remedies including both equitable and legal relief. It does not supplant or repeal remedies available under the Constitution and the laws of the United States for equitable relief. Remedies under § 1983 include compensatory and punitive damages against state actors in their individual capacities, compensatory damages against municipalities, and attorneys' fees. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); 42 U.S.C. § 1988.

Preemption claims seek only to enforce the structural relationship between federal and state law established by the Constitution and thus are limited to obtaining prospective equitable relief against state and local officials in their official capacities. The remedies are limited to those "necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). "Preemption concerns the federal structure of the

Nation rather than the securing of rights, privileges, and immunities to individuals." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 117 (1989). For a non-frivolous preemption claim, "denial of a judicial remedy would undermine federal supremacy and subvert the rule of law by enabling state officers to proceed with enforcement of an invalid state law, to the detriment of private parties." David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 409 (2004).

This Court has emphasized that preemption claims and §1983 serve different purposes and have different requirements. In *Golden State Transit Corp.*, for example, Justice Kennedy explained that though he would have held that the plaintiff could not bring its action under § 1983, nevertheless:

> we would not leave the [plaintiff] without a remedy. Despite what one might think from the increase of litigation under the statute in recent years, § 1983 *does not provide the exclusive relief* that the federal courts have to offer. * * * [P]laintiffs may vindicate [statutory] preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes. See 28 U.S.C. § 1331 (1982 ed.); 28 U.S.C. § 2201; 28 U.S.C. § 2202 (1982 ed.). These statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983.

Id. at 119 (Kennedy, J., dissenting) (some citations omitted, emphasis added).

III. THE PETITION SHOULD BE DENIED AS TO THE SECOND QUESTION BECAUSE THE LAW OF THE NINTH CIRCUIT WITH RESPECT TO SECTION (a)(30)(A) OF THE MEDICAID ACT HAS EVOLVED AND THERE IS NO LONGER ANY SPLIT AMONG THE CIRCUITS.

Petitioners assert that *certiorari* should be granted to decide the question whether Medicaid provider reimbursement rates that bear no relationship to the costs of providing such services, and which are established or maintained purely as budgetary matters violate 42 U.S.C. §1396a(a)(30)(A). Pet. at i. They further assert that the Ninth Circuit's position on this question is somehow "at odds" with that of other circuits. Pet. 25. Because the Ninth Circuit has already changed how it applies the law in response to this Court's opinions in *Douglas*, *certiorari* is simply unnecessary.

In *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), the District Court had addressed the issue whether "the State must provide higher payments to hospitals for provision of outpatient services because hospitals incur higher costs than other types of providers." *Id.*, at 1495. The issue arose, in part, because California's Medicaid plan, which had been approved by CMS, "require[d] the Department to develop an evidentiary base or rate study" as part of setting reimbursement rates. *Id.*, at 1494. The requirement for rate studies was thus part of the State Medicaid Plan's method of determining whether the statutory factors of economy, efficiency, access and quality of care had been met. 42 U.S.C. §1396a(a)(30)(A).

In that setting, where the state plan, as approved by CMS, sought to satisfy the statute by requiring the preparation of and reliance on studies of the costs of medical services in setting reimbursement rates, the Ninth Circuit held that:

> The Department cannot know that it is setting rates that are consistent with efficiency, economy, quality of care and access without considering the costs of providing such services. It stands to reason that the *payments* for hospital outpatient services must bear a reasonable relationship to the costs of providing quality care incurred by efficiently and economically operated hospitals.

103 F.3d 1491, 1496.

Orthopaedic Hospital was more widely (though it now appears incorrectly) read as requiring that all Medicaid reimbursement rates bear a reasonable relationship to the costs of providing services. *Orthopaedic Hospital* was read that way to support the various decisions that were consolidated to and remanded in *Douglas*. The District Court in this case understood *Orthopaedic Hospital* in those terms, and, in fact, the instant case was so factually similar to *Orthopaedic Hospital*, that closer analysis was unnecessary and would not have yielded a different outcome. It is the rule of *Orthopaedic Hospital* that Petitioners seek to have this Court review and reverse. Pet. 24.

Both *Orthopaedic Hospital* and the instant case raised the same federal statute. Idaho law, like California law at the time of *Orthopaedic Hospital*, required that reimbursement rates be based on "[t]he actual cost of providing quality services." Idaho Code §56-118. And in

both cases, the state had sought CMS approval for a rate setting methodology that called for conducting and relying on cost studies. It is no surprise that the outcome should be the same in the two cases.

It is now clear, however, that *Orthopaedic Hospital* must be applied much more narrowly than the District Court had thought. That narrow application would not change the outcome of this case, but does bring the Ninth Circuit generally into agreement with the other circuits as to the proper application of Section (a)(30)(A), rendering unnecessary the Petitioner's request for *certiorari* on this issue.

While the panel in this case refused to overrule *Orthopaedic Hospital*, stating that as a three-judge panel it was not free to overrule a prior panel of the Circuit, the panel that decided *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235 (9th Cir. 2013), faced a different set of facts, and was thus able to clarify and refine *Orthopaedic Hospital* without having to overrule it.

Managed Pharmacy Care was ready for decision only after this Court had spoken in *Douglas*. It also arrived at the Ninth Circuit after CMS had approved a State Plan Amendment ("SPA") which permitted the reimbursement rates in question. In assessing the particular SPA, the Secretary of Health and Human Services, acting through CMS, had approved a rate setting methodology that did not rely on cost studies. Such an approval was entitled to deference, precisely because of the differences in the ways various states structure their Medicaid programs, and because of the deference owed to any administrative agency applying a statute for which it has responsibility:

> The position that costs might or might not be one appropriate measure by which to study beneficiary access, depending on the circumstances of each state's plan, is entirely reasonable. Each state participating in Medicaid has unique, local interests that come to bear. The Secretary must be free to consider, for each State, the most appropriate way for that State to demonstrate compliance with §1396a(a)(30)(A).

Managed Pharmacy Care, 716 F.3d at 1249. Recognizing that *Orthopaedic Hospital* appeared to require a particular methodology for rate setting and thus varied from the approach taken by other states, the Ninth Circuit expressly concluded that with the decision in *Managed Pharmacy Care* to defer to CMS's approval, it would "join" those Circuits. *Id.* at 1249-1250. Thus, as far as that panel was concerned, there was no longer a split among the circuits.

The decision in *Managed pharmacy Care* did not overrule *Orthopaedic Hospital*, instead the panel held that case did not control the outcome because it did not consider the effect of CMS's approval of the State Medicaid Plan. *Id.* at 1245. The only possible way to reconcile the two decisions is to recognize that *Orthopaedic Hospital* was a case addressing a State Medicaid Plan that required cost studies and that, as a result, cost studies were a necessary component of complying with Section (a)(30)(A), while *Managed Pharmacy Care* addressed a State Medicaid Plan that utilized other methods of compliance, which had likewise been approved by CMS. The panel in the instant case, as well as the parties, can be excused for any confusion these cases might have left. Any confusion, however, was irrelevant, since the present case involves a

State Plan (or, in this case a waiver) which requires cost studies, rendering this case more akin to *Orthopaedic Hospital* than to *Managed Pharmacy Care.*[4]

The current state of the law in the Ninth Circuit can now only be understood as requiring cost studies if a State Plan or waiver requires cost studies, but not requiring such studies if CMS has approved a State Plan or waiver that does not require such studies. In short, as in every other Circuit, and as *Douglas* strongly suggests it should be, deference to CMS is the rule in the Ninth Circuit. There is simply no reason to grant *certiorari* to decide whether this case, decided under an older rule that has now been modified and refined to address the very problem Petitioners complain of, should itself be modified or refined.

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4. The Ninth Circuit has further reduced the confusion by issuing *Santa Rosa Mem. Hosp. v. Douglas* 552 Fed.Appx. 637 (9th Cir. 214). In that case the Circuit addressed the remand that was ordered in *Douglas*. Since its prior decision in that case, the Ninth Circuit found, "there have been a number of developments." *Id.* at 638. These developments included the remand order in *Douglas*, repeal of the challenged rate reductions, and the fact that CMS had "approved rate reductions" for the period prior to their repeal. *Id.* In other words, like *Managed Pharmacy Care*, the rate reductions were now part of the CMS-approved state plan. In light of the approval, the Ninth Circuit found that the District Court had abused its discretion in requiring cost studies as a prerequisite to any rate change, and remanded the case to the District Court to consider whether CMS's approval rendered the preliminary injunction inappropriate. *Id.*, at 640.

IV. AS TO THE SECOND QUESTION, THE PETITION SHOULD BE DENIED BECAUSE THE CENTER FOR MEDICARE AND MEDICAID SERVICES IS ON THE VERGE OF PUBLISHING NEW RULES WHICH WOULD CLARIFY THE REQUIREMENTS STATES MUST MEET TO DEMONSTRATE THAT THEIR REIMBURSEMENT RATES ARE CONSISTENT WITH SECTION (a)(30)(A).

In light of growing discord among states, service providers and CMS over the meaning of Section (a)(30)(A)'s provisions on reimbursement rates, CMS has proposed new rules which would clarify those provisions and specify what states must do to ensure that its provisions are met. In May, 2011, CMS published notice of proposed rule making, proposing amendments to require states to actively assess and gather data relating to Medicaid participant access to services, provide for public input from participants and other stakeholders prior to any rate reductions, require an analysis of any proposed rate reduction's affect on access and the state's methods of addressing that impact, and require rate review at least every five years for each service provided. MEDICAID PROGRAM: METHODS FOR ASSURING ACCESS TO COVERED MEDICAID SERVICES, 76 FR 26342 (May 6, 2011)(amending 42 CFR Part 447).

While the final rule has been delayed, CMS has not abandoned the rulemaking, and recently stated that it intends to complete the process and publish a final rule. On May 23, 2014, the federal government website "RegInfo.gov" published its semi-annual "Unified Agenda." The Spring, 2014 Unified Agenda identified the proposed amendments to 42 CFR 447 as ongoing, and stated that

it expected to publish a final rule in November, 2014. UNIFIED AGENDA, Spring 2014, available at http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=0938-AQ54 (last visited August 21, 2014).

On January 16, 2014, CMS published a different final rule which, while not as comprehensive on reimbursement rate and access issues as the rule currently under consideration, did make significant changes to the regulations governing waivers, including clarifying that changes to "methods and standards for setting payment rates" for waiver services, must be preceded by public notice and an opportunity for public input. 42 CFR §441.304(e) and (f).

This litigation, the litigation that resulted in the decision in *Douglas* and a number of other cases, were spawned by the lack of clear guidance as to what states must do to comply with Section (a)(30)(A). The new regulations by CMS, both those already finalized, and those likely to be finalized this year, will provide at least a portion of guidance and should result in states, including Idaho, revising procedures and methods for ensuring compliance with the statute. There is simply no good reason for this Court to address the requirements of Section (a)(30)(A) when the responsible agency is about to do so.

CONCLUSION

For all the reasons set out above, the petition should be denied.

Respectfully submitted,

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